Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

DONALD W. WRIGHT, JACK W. BELL, KENNETH A. BRAUN, HILDEGARDE E. CUTTS, J. E. DUNN, and RALPH STROHMAIER, Petitioners,

v.

AMF CORPORATION and AMF VOIT, INC., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In distinguishing severance pay from vacation pay in Massachusetts v. Morash, 490 U.S. 107 (1989), did this Honorable Court determine that every promise by every employer to pay severance benefits upon termination of employment constituted a welfare benefit plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1 Sec.) ["ERISA"]?

2. Is a severance pay policy of a California employer a welfare benefit plan under ERISA if it provides for a one-time lump sum payment triggered by a single event which requires no administrative scheme, is payable on a regular basis from the general assets of the employer and is calculated on the basis of longevity of employment?

3. If an employer maintains a written severance policy in which the employer promises to pay a termination allowance based on longevity of employment upon separation at company convenience and that policy is later determined to be a welfare benefit plan under ERISA, can the employer defeat performance of its severance pay promise by claiming a right under ERISA to modify the "plan" at any time, even at the time performance is due?

4. If an employer maintains a severance pay policy providing severance pay upon separation at company convenience and the policy constitutes a welfare benefit plan under ERISA, is the employer obligated to pay severance pay to employees who are offered employment by the company purchasing the assets of the employer if the purchaser has no severance

pay policy, has not assumed the obligation to pay under the policy upon subsequent termination and, after the acquisition, relocates its facilities out of California and terminates the employees?

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TO THE SUPREME COURT OF

THE STATE OF CALIFORNIA

GROUNDS FOR REVIEW BY THIS HONORABLE COURT

Petitioners are former employees of Respondent AMF Voit, Inc., who were denied severance pay benefits when they were separated from their employment upon the

sale of the company by the parent corporation, Respondent AMF Voit Corporation, to Reltron Corporation, a New York corporation. Petitioners were members of a group who were selected by Reltron for continued employment but were then subsequently terminated once Reltron relocated the business out of California following the purchase.

Petitioners seek review of the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division III filed in this action on February 23, 1994, affirming the Judgment of the trial court in favor of Respondents. The Decision of the Court of Appeal is set forth hereinbelow as Appendix A, pages 43-60. The California Supreme Court denied review on May 12, 1994.

Review by this Honorable Court is

necessary and proper under Rule 10(c) of the Rules of the Supreme Court of the United States in that the decision of the Court of Appeal is not consistent with this Court's decisions in Massachusetts v. Morash, 190 U.S. 107 (1989) and Fort Halifax Packing Company, Inc. v. Coyne, 482 U.S. 1 (1987). Review is necessary and proper as this Petition presents important Federal questions affecting rights and interests of employees throughout the United States who have been promised severance pay upon their termination of employment based upon length of service and are unaware that this Court's decision in Morash, Supra, will be construed arbitrarily to defeat their claim for severance pay benefits under ERISA.

This Court has jurisdiction to review the aforesaid judgment under 28 U.S.C.,

Section 1254(1), and in particular, jurisdiction over Federal questions concerning the following provisions of ERISA: 29 U.S.C., Section 1002(1); 29 U.S.C., Section 1002(3) and 29 U.S.C., Section 1144(a) of ERISA. [See Appendix B]

SUMMARY OF CASE

Since at least 1971, Respondent AMF Corporation maintained Corporate Policy 3-17 entitled "Termination Allowance" which provided for the payment of severance pay to salaried employees separated at company convenience through reduction of work load, reorganization, or relocation of facilities. The amount of the severance pay benefits paid under the Policy was based upon longevity of service (one and one-half weeks' wages for each year of service with the company).

On July 6, 1984 AMF Corporation entered into an agreement for the sale of the assets of its subsidiary AMF Voit, Inc., to Reltron Corporation, a New York corporation, effective August 1, 1984. Thereafter, and prior to August 1, 1984, Reltron selected some of the employees of AMF Voit for employment upon acquisition. However, Reltron did not assume the obligation to pay severance pay to those employees of AMF Voit who were offered employment with Reltron. Reltron had no severance pay policy of its own. On August 1, 1984 officers of AMF Corporation appeared at the AMF Voit facility in Buena Park, California, and divided the employees of AMF Voit into two groups. Group 1 consisted of employees of AMF Voit who had not been selected by Reltron for employment after the acquisition. Group 2 consisted of the petitioners and

plaintiffs below. Separate meetings were held with each group. Group 1 employees were presented with a "AMF Voit, Inc. General Statement" which informed that they were not being offered employment with Reltron and would be provided one and one-half weeks' severance pay for each year of service as well as employee benefit continuation for a period of three months. The Group 2 employees (petitioners) were told that they were going to work for Reltron; that they had no choice in the matter; that they would not receive severance pay and if they did not go to work for Reltron, their termination would be treated as a voluntary termination and they would not receive severance pay or unemployment benefits.

After the acquisition, and over a period of several months, Reltron then

transferred the warehousing operation of AMF Voit to Nevada and the administration function of the business to New York. As this transition and transfer process occurred, petitioners were terminated.[1] Meanwhile, petitioners brought suit in State Court in California for violation of California Labor Code §201. Based on the case of Chapin v. Fairchild Camera and Instrument Corp. (1993) 31 Cal. App. 3d 192, 107 Cal. Rptr. 111, petitioners alleged that the sale of AMF Voit to Reltron constituted a termination of their employment and entitled them to severance pay under AMF Corporate Policy 3-17. [See

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[1]Reltron paid some severance pay benefit to some of the petitioners at the time of their termination from Reltron but the amount paid by Reltron was substantially less than what petitioners would have received if they had not been forced to work for Reltron during the aforesaid transition.

Appendix C]

After petitioners commenced suit, respondents demurred to the State action on the grounds that petitioners' claim for severance benefits was preempted under ERISA. It is undisputed in the case that neither petitioners or respondents considered AMF Corporate Policy 3-17 to be a plan under ERISA during petitioners' employment for AMF Voit, Inc. Nevertheless, the Court of Appeal of the State of California determined that AMF Corporate Policy 3-17 constituted a "plan" under ERISA and subsequently affirmed the judgment of the trial court that under ERISA AMF could modify its plan at any time and that the "AMF Voit, Inc., General Statement" of August 1, 1984 (date of termination) constituted an enforceable modification of the plan, denying severance pay benefits to petitioners.

ARGUMENT

A. REASONS WHY WRIT SHOULD BE GRANTED

The circumstances giving rise to the denial of severance pay benefits to petitioners is simply not consistent with the intent and purpose of ERISA or the Court's decisions in Morash or Fort Halifax, supra. When a severance pay benefit is not part of a defined plan under ERISA, employees (like petitioners herein) and employers (like respondents herein) are not aware that the employers' promise to pay severance pay benefits may be governed by ERISA. The primary purpose of Congress in enacting ERISA was to protect employees from mismanagement of funds accumulated to finance employee benefits and the failure of employers to pay employee benefits from accumulated funds. The arbitrary application of ERISA to all promises to pay severance pay by

all employers goes beyond the scope and purpose of ERISA and unreasonably intrudes into the State's power to regulate the employment relationship. Where the severance pay benefit is clearly defined as a part of an established plan under ERISA, the recipients are afforded important protection under the disclosure requirements of ERISA to insure that the recipients know exactly where they stand with respect to eligibility for benefits under the plan. Where the severance pay benefit is first defined as a plan under ERISA after termination has occurred (or after suit has commenced as in the instant case), the "plan" participants have been denied the benefits of the disclosure requirements under ERISA and yet, the employer is able to assert ERISA as a sword to defeat the application of State law and the reasonable expectations of

employees. ERISA does not specify when a promise by an employer to pay severance pay constitutes a plan under ERISA. It does not define what constitutes a "severance" or "termination" for purposes of eligibility for severance pay benefits. Under California law, if the assets of the employer are acquired by a company which does not provide the same severance pay benefit and does not undertake to discharge the seller's obligation of severance pay under the terms of the acquisition agreement, the employer is obligated to pay severance pay benefits under its policy even to those employees who are offered employment by the purchaser. See Chapin v. Fairchild Camera Instrument Corp. (1973) 31 Cal. App. 3d 192, 107 Cal. Rptr. 111. The decision in Chapin, supra, is a well reasoned decision. It protects the reasonable

expectations of the employee and recognizes the reality that the sale of the assets of an employer terminates the employment relationship such that when the subsequent termination of employment with the purchaser occurs, the employee will be denied the very benefit which the employee would have received but for the acquisition. The foregoing concerns, affect every employee in the United States who has been promised severance pay benefits by his or her employer to entice them to come to work for the employer, or to continue in their employment or to forego other employment opportunities. Therefore, this court needs to clarify the scope of ERISA's application to promises by employers to pay severance pay upon termination of employment.

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B. COURT'S DECISION IN MORASH DID NOT EXTEND ERISA TO EVERY SEVERANCE PAY PROMISE BY EVERY EMPLOYER IN AMERICA.

Petitioners asked the Court of Appeal to first determine whether every promise to pay severance benefits by every employer constituted a "plan" under ERISA in light of this Court's decisions in Massachusetts v. Morash (1989) 490 U.S. 170, 109 S.Ct. 1668 and Fort Halifax Packing Company, Inc. v. P. Coyne (1987) 482 U.S. 1, 107 S.Ct. 2211. In its opinion, the Court of Appeal omits discussion of Fort Halifax Packing Company, supra, but cites dictum from this Court's decision in Morash, supra, as support for its prior decision that Petitioners' claim is preempted by ERISA. The Court of Appeal relies upon language from this Court's decision in Morash "distinguishing" vacation benefits from

the benefits enumerated in Section 3(1) of ERISA [29 USC §1002(1)]. Specifically, the lower court relied upon the following language from this Court's decision in Morash:

> "unlike normal severance pay, the employee's right to compensation for accrued vacation time is not contingent upon the termination of their employment." 490 U.S. at pp. 118-119.

The ratio decidendi of the decision in Morash turned on whether or not the benefit was paid from the general assets of the employer and accumulated over time only at the election of the employee. 490 U.S., at 116. In fact, this Court expressly observed that if an employer created a separate fund to pay employees vacation benefits, then the benefit would be subject to ERISA. 490 U.S. 114.

Nowhere in Morash is there any language indicating that every promise to pay severance pay by every employer constitutes a plan under ERISA simply because promises to pay employees severance benefits are payable only upon termination of employment or because severance pay does not accumulate over a period of time or because the severance pay is not payable only upon the occurrence of a contingency outside the control of the employee. Nor is there any language contained anywhere in Morash to indicate that all severance pay policies of all employers lack the characteristics of vacation pay. Indeed, the uncontroverted evidence in the instant case is that the severance pay benefit of AMF Voit did accumulate over time and was payable only upon the occurrence of a contingency outside of the employee's

control. The severance pay benefit under AMF Corporate Policy 3-17 was expressly tied to years of service and payment was triggered upon the occurrence of contingencies outside the control of Petitioners, to wit: separation from the Company (AMF Voit, Inc.) ". . . at Company convenience through reduction of work load, reorganization or relocation of facilities." Further, the fact that severance pay is payable only upon termination of employment whereas vacation pay is payable prior to termination or at time of termination, does not mean that Congress intended that all promises by all employers to pay severance pay, constitute plans under ERISA. There is absolutely no language contained anywhere in the Morash decision to indicate that the court has interpreted ERISA as reflecting an intent by Congress to regulate the entire subject

of severance pay. Nor is there any language anywhere in ERISA to indicate that Congress intended to regulate all severance pay promises by all employers in America.

The suggestion by the Court of Appeal herein that this court in Morash, supra, intended by the above-quoted statement to say that all severance pay benefits are governed by ERISA is expressly contradicted by this Court's decision in Fort Halifax Packing Co. v. Coyne (1987) 482 U.S. 1, 107 S.Ct. 2211. In that case, an action was brought to enforce rights under a Maine statute requiring employers to make a one-time severance payment to employees in the event of a plant closing. The employer sought a defense of preemption claiming that severance was a benefit under ERISA and therefore ERISA preempted state law on severance pay

benefits. This Court held that the Maine statute was not preempted by ERISA "because the statute neither establishes, nor requires an employer to maintain, an employee welfare benefit plan under the Federal statute." 42 US, at 6. The Supreme Court's reasoning in Fort Halifax was:

> ". . . The requirement of a one-time, lump sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation . . . . The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits." 482 US, at 12.

This Court's reasoning in Fort Halifax is consistent with the ratio decidenti of its decision in Morash:

". . . It is unlikely that Congress intended to subject to ERISA's reporting and disclosure requirements those vacation benefits which by their nature are payable on a regular basis from the general assets of the employer and are accumulated overtime only at the election of the employee." 490 US, at 116

* * *

"In reaching this conclusion, we emphasize that the case before us/and the Secretary's regulations on which we rely/concern payments by a single employer out of the general assets. An entirely

different situation would be presented if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regularly shift their jobs from one employer to another . . . ." 490 US at 120.

C. **AMF SEVERANCE POLICY WAS NOT A PLAN UNDER ERISA AND PETITIONERS WERE ENTITLED TO THE SAME BENEFITS OTHER EMPLOYEES RECEIVED FROM AMF ON AUGUST 1, 1984.**

The uncontroverted evidence in this case and which the Court of Appeal acknowledged, is that the severance pay benefits paid to employees of AMF Voit were paid from the general assets of the corporation and the amount of the severance pay benefits accumulated over time. The longer an employee of AMF Voit

was employed for the company, the large his severance pay benefits under Policy 3-17. Thus, the severance pay benefit in the instant case was a form of incentive or bonus program, accumulated over time and payable from the general assets of the employer. Therefore, it was not a plan under ERISA.

AMF Corporate Policy 3-17 was not part of any defined plan under ERISA and neither Petitioners or Respondents were even aware of the possible application of ERISA until after suit commenced in this case. Since at least 1971, AMF Corporate Policy 3-17 provided:

> Any salaried employee is eligible for a termination allowance if he is separated at company convenience through reduction of work load, reorganization or relocation of

> facilities, unless he (1) is a member of a bargaining unit; (2) has an employment contract specifying otherwise; (3) was hired with a written understanding that the job was for a temporary period; (4) has reached the normal age of retirement.

There was no exception stated anywhere in Policy Memorandum 3-17 other than the exceptions enumerated above and in particular, no exception for employees who were separated at company convenience but offered employment by the purchaser of the assets of the company. Since Corporate Policy 3-17 was not part of a plan under ERISA, Petitioners were not afforded the protection of ERISA'S disclosure requirements which were intended to insure that the individual

participant of a plan "knows exactly where he stands with respect to the plan." Firestone Tire and Rubber Company v. Bruch (1989) 489 US 101, 118, citing H.R. Rep. No. 93-553, page 11 (1973), US Code Congressional Administrative News 1978, page 4649. Thus, up until the time of Petitioners' termination on August 1, 1984, the only writing generated by Respondents concerning the terms and conditions for eligibility of severance pay benefits under Policy 3-17 was the Corporate Policy Memorandum 3-17. On August 1, 1984, officers of Respondent AMF Voit Corporation (the parent corporation) appeared at the facility of the employer/subsidiary AMF Voit, Inc., in Buena Park, California, and divided the employees of the company into two groups. Group 1 consisted of employees of AMF Voit who had not been selected by the

purchaser, Reltron, for employment after the acquisition. Group 2 consisted of the Plaintiffs in the instant case. Separate meetings were held with each group. Group 1 employees were presented with a "AMF Voit, Inc., General Statement" which informed that these employees were not being offered employment with Reltron and that AMF would provide one and one-half weeks' severance pay for each year of service, as well as employee benefit continuation for a period of three months, or for the period of severance, whichever was longer. Petitioner Donald W. Wright testified at trial that in the meeting with the Group 2 employees (Plaintiffs/Petitioners), these employees were told:

> "Those of you in this room are going to work for Reltron. You do not have a choice. Reltron

is going to be your employer. There will be additional work load, additional responsibilities there (will) be fewer of you going to work for Reltron than there was working at AMF Voit, Inc." [R.T. p 52, lns 4-10]

Petitioners were told that if they did not go to work for Reltron, the separation would be considered a voluntary termination and they would not receive severance pay or unemployment compensation. They were not offered alternative employment positions with AMF or any of its other subsidiary corporations. The AMF Voit, Inc., General Statement published at the time of the termination on August 1, 1984 also stated:

"AMF will provide severance and benefit continuance for all

those employees being terminated who do not have a job with Reltron. Some employees will be requested to stay on to conclude the activities of AMF Voit and others will be severed now." (Emphasis added)

Some employees in Group 1 received severance pay benefits under Policy 3-17 and then subsequently were hired by Reltron. At trial, Petitioners produced evidence to show that Plaintiffs' role was simply to facilitate the transition of AMF Voit business into Reltron. Reltron was not a manufacturing concern like AMF: "They purchased everthing that they did and imported it and sold it on a retail level." [R.T. p 170 at lns 17-18] Following the acquisition by Reltron, the employments of the Group 2 employees (Plaintiffs) terminated as Reltron merged

the administration aspect of the AMF Voit business into its administrative operation in New York and transferred the warehousing operation to Nevada. At trial, Petitioner Kenneth A. Braun testified regarding his employment experience at Reltron. At the time of the sale in August 1984, Mr. Braun was in charge of the machine shop operation at the Buena Park facility of AMF Voit. His job then involved supervision of all the tooling that was required to manufacture sporting goods equipment at AMF Voit and supervise both salaried and union employees. [R.T. p 164, lns 24-26 & p 165, lns 1-10] Petitioner Braun testified that his job at Reltron was "not even close" to the job he had at AMF Voit. After the acquisition, Reltron put Petitioner Braun in charge of disposition of tooling and racking and inventory and

office supplies and desks and chairs and then eventually sweeping the floor and locking the door as the facility was closed.

At the time of the acquisition, Reltron did not have a a severance pay policy much less a policy comparable to AMF Voit, Inc. Moreover, Reltron did not assume the obligation to pay severance pay benefits to Group 2 employees when their employment with Reltron did terminate following the merger of the business and transfer of the operations to New York and Nevada. Some of the Plaintiffs did receive a partial severance payment from Reltron when they were subsequently terminated by Reltron. However, others did not receive any severance benefit when they terminated their employment in anticipation of termination by Reltron with the understanding that there was no

severance pay policy offered by Reltron.

In Chapin v. Fairchild Camera and Instrument Corporation (1973) 31 Cal. App. 3d 192, 107 Cal. Rptr. 111, the court held that severance pay is a form of accumulated compensation for past services and a material recognition of their past value. In Chapin, Fairchild Corporation sold substantially all of its assets of one of its subsidiaries, Memory Products, to Core Memories, Inc. (Core). In the negotiations, Core expressed the desire to retain all of the employees of Memory Products and employ them in identical jobs with continuing seniority rights and similar but not identical fringe benefits. However, there was no provision for severance pay in the asset purchase agreement. All but one of the employees of Fairchild-Memory Products transferred to Core. Subsequently, Core terminated

approximately half of the former Fairchild employees and paid severance benefits to them. However, these severance pay benefits were not equal to the amounts that would have been payable to them pursuant to the Fairchild severance pay policy. These employees then brought suit against Fairchild claiming that they were entitled to receive the severance pay due and owing to them by Fairchild at the time of the sale of Memory Products to Core. The trial court found that the plaintiffs had been given the option by Fairchild at the time of the sale of obtaining severance pay from Fairchild if they did not wish to become employed by Core or going to work for Core. The trial court found that the acceptance of employment with Core by the plaintiffs was done with full knowledge, freely and willingly. The trial court therefore concluded that the

plaintiffs had waived any rights pursuant to the agreement with Fairchild and that acceptance of employment with Core constituted a novation and substitution of Core's terms of employment for those at Fairchild. The Court of Appeal reversed. The court held that severance pay benefits are wages due and payable at the time of termination. Fairchild argued, however, that the plaintiffs suffered little, if any, immediate economic loss as they remained in continuous employment with their seniority rights and at the same rate of pay. The court in Chapin rejected the arguments saying:

> "This argument involves the proposition that events occurring subsequent to the layoff are the important factors in the determination of whether the plaintiffs are entitled to

separation pay. This is not true. As pointed out in Adams v. Jersey Central Power and Light Co., 36 New Jersey, supra, 53, 71, 114 Atlantic 2d 776, affirmed, 21 New Jersey 8, 120 Atlantic 2d 737, unemployment is not a prerequisite to the right to severance pay which may, and frequently does, exist where there is no interruption whatever in the continuity of employment. Separation pay is not analogous to nor is it a form of unemployment compensation. Rather, it is a kind of accumulated compensation for past services and a material recognition of their past value. It concerns the past, not the future. And once it is earned,

it becomes payable no matter what may thereafter happen."

[31 Cal. App. 3d, at 198-199]

The court in Chapin made clear that the sale of Memory Products by Fairchild to Core constituted a permanent release of the employees, thereby giving rise to the obligation to pay the severance pay. In Chapin, the court attached particular importance to the fact that the employees were hired by the purchaser (Core) under substantially different terms that did not include a severance pay policy of the same duration and did not include an undertaking by Core to discharge Fairchild's severance pay obligation.

In the instant case, Petitioners were not given a choice as to whether to go to work for Reltron or receive severance pay. Petitioners were told they had to go to work for Reltron and that if they did not,

their termination from AMF Voit would be deemed a voluntary termination and they would not receive severance pay or unemployment compensation. Like Chapin, there was a substantial difference in employment benefits in that Reltron did not offer a severance pay policy. Like Chapin, there was no assumption of the severance pay obligation by Reltron. Unlike Chapin, there was substantial differences in the employment. While it is true that Plaintiffs continued at their same salary rate and same job titles, the nature and conditions of their employment changed dramatically as evidenced by the change in the employment of Petitioner Braun. Finally, unlike Chapin, in the instant case Petitioners' employment was short-lived. Petitioners' employment terminated as the process of concluding the activities of AMF Voit in California

progressed to the complete transfer of both the administrative and warehousing operations out of State.

The Court of Appeal affirmed the trial court's determination that Petitioners were not "separated" by the sale of AMF Voit to Reltron and that the intended purpose of Policy 3-17 was to provide ". . . a buffer against the privations which so often attend unforeseen layoff," citing Allen v. Adage, Inc. (1st Cir. 1992) 967 F.2d 695, 702. The Court of Appeal, however, omits any discussion of the California rule under Chapin, supra, or Petitioners' evidence regarding the differences between the employment at AMF Voit and the employment at Reltron. Moreover, the Court of Appeal does not address the fact that Petitioners' employment was short-lived and lasted only as long as it took for

Reltron to transfer its warehousing to Nevada and its administrative operation to New York. Instead, the Court of Appeal simply says that its task was to uphold the judgment of the trial court if supported by "any credible evidence, notwithstanding the existence of evidence to the contrary." The Court of Appeal cited as authority for this proposition, Bowers v. Bernards (1984) 150 Cal. App. 3d 870, 873-874. However, the court in Bowers, clearly states that there must be "substantial evidence" which is not simply defined as "any credible evidence" but rather evidence "of propounderable legal significance, reasonable in nature, credible, and of solid value." [Ibid] In the instance case, the judgment was not supported by substantial evidence. Policy 3-17 contained no language which would deny Petitioners severance pay upon the

termination of their employment from AMF Voit. Respondents' argument that the "AMF Voit, Inc., General Statement" constituted a modification of Policy 3-17 was not credible and indeed, was inconsistent with Respondents' contention that Policy 3-17 was unambiguous and did not afford severance pay benefits to Plaintiffs. Policy Memorandum 3-17 sets forth the corporate policy on termination allowance on a preprinted corporate policy form. The "General Statement" was not set forth on AMF Corporate Policy Form and could only be fairly construed as a last minute "bulletin" of what AMF Corporate intended to do. Finally, the judgment was not supported by substantial evidence consistent with the reasonable expectations of Plaintiffs/Petitioners. In fact, the Court of Appeal decision did not even attempt to ascertain whether the

judgment was supported by substantial evidence consistent with the Plaintiffs' reasonable expections even though the Court of Appeal acknowledged that a de novo review was appropriate. Clearly, there was a lack of substantial evidence to support the trial court's judgment regarding the reasonable expections of Plaintiffs given that the uncontraverted evidence at trial was that none of the Plaintiffs were ever told that they would not receive severance pay if the assets of the company were sold and they were offered employment by the purchaser. In fact, the evidence received by the trial court on this issue and as outlined in the Opening Brief of Petitioners to the Court of Appeal, was the testimony of Petitioners and in particular, Plaintiff Jane Heintz who was the Human Resources Adnministrator for AMF Voit. Mrs. Heintz

testified at trial that she was required to explain the severance policy to employees of the company and relied upon Corporate Policy 3-17 to do so. She also testified that she paid severance pay benefits and/or processed the paperwork to effectuate a payment of severance pay benefits to employees while employed for the company. [R.T. pp 56-57] Mrs. Heintz testified categorically that the General Statement of August 1, 1984 was not the severance pay policy of AMF Voit. [R.T. pp 62-63] She further testified that while employed as the Human Resources Administrator for AMF Voit, she received no prior communications or consultation at all regarding what would happen to employees of AMF Voit upon the sale of the company to Reltron. Further, Petitioner Donald Wright was Distribution Manage for AMF Voit and employed for the company for

a little over nine years. [R.T p 36] Mr. Wright testified that at the meeting of August 1, 1984, AMF Corporate Officers did not tell Plaintiffs that there was no severance Policy 3-17 and did not state that Policy 3-17 had been superceded. [R.T. p 127, lns 8-16] Moreover, Mr. Wright testified that Plaintiffs were not told at the meeting that the General Statement was the new Policy on severance pay. [R.T. p 127 lns 19-23] Further, Mr. Wright testified that during the entire time he was employed for Reltron after August 1, 1984, he never received anything in writing from AMF informing him that the General Statement was the new severance pay Policy and that this was why he did not receive severance pay on August 1, 1984. [R.T. p 128 lns 2-9] Clearly, the trial court and the Court of Appeal should have concluded that there was a lack of

credible evidence to support the proposition of Respondents that Policy 3-17 was modified by the "General Statement." Further, the Court of Appeal should have taken into consideration the reasoning in Chapin, supra, particularly given the circumstances of Petitioners' employment post termination from AMF Voit. Petitioners were "severed" from AMF Voit and at the time of Petitioners' termination of employment on August 1, 1984, Respondents clearly knew that for Plaintiffs "the privations which so often attend unforeseen layoffs" was merely being delayed until Plaintiffs assisted Reltron in the transfer of the AMF Voit operation out of the State of California.

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CONCLUSION

WHEREFORE, Petitioners respectfully request that this court grant certiorari.

DATED: August 5, 1994

Respectfully submitted,

By _____
FRED J. KNEZ
Counsel of Record

APPENDIX A: WRIGHT V. AMF CORP.

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DONALD W. WRIGHT et al.,

Plaintiffs and Appellants,

v.

AMF CORPORATION, ET AL.

Defendants and Respondents.

No. G011488

OPINION

Appeal from a judgment of the Superior Court of Orange County, David H. Brickner, Judge. Affirmed.

Knez & Jolley and Fred J. Knez for Plaintiffs and Appellants.

Latham & Watkins, Kenneth W. Oder, Joseph B. Farrell and Andrew M. Paley for

Defendants and Respondents.

Filed February 23, 1994

AMF Voit, Inc., a subsidiary of AMF Corporation, was acquired by Reltron Corporation through an asset purchase. Appellants, a group of Voit employees, were offered employment with Reltron with the proviso that if they refused, their termination from Voit would be considered voluntary and they would be denied severance benefits. Appellants, most of whom accepted Reltron's offer, filed a complaint for damages based on state law, and Voit successfully demurred on the grounds the action was preempted by ERISA. That determination was affirmed on appeal by this court in September 1988. The one surviving cause of action was tried under ERISA, and the trial court found there was no right to severance benefits.

Appellants claim an intervening

change in the law requires us to re-examine our decision that the state law claims are preempted by ERISA. Alternatively, they claim the judgment denying them severance benefits under ERISA must be reversed because the trial court failed to use a de novo standard of review of Voit's corporate policy and under that standard there is insufficient evidence to support the judgment; they also claim the trial court failed to follow principles of equity in making its decision. Voit requests sanctions against appellants for filing a frivolous appeal and for repeated violations of the court rules. We deny the request for sanctions and affirm the judgment.

* * * * *

In July 1984 AMF Corporation entered into an asset purchase agreement with Reltron Corporation for the sale of the

assets of Voit to Reltron. The sale closed on August 2, 1984. On August 1, AMF officers came to the Voit facility and divided the Voit employees into two groups: Group one were employees not offered jobs by Reltron; and group two were employees whom Reltron wished to retain. Group one employees were presented with an "AMF Voit, Inc. General Statement," which explained that their jobs were being eliminated by Reltron's acquisition of Voit and there were no alternative positions with AMF. They would receive one and one-half weeks severance pay for every year of service. Group two employees[1] were told they would

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[1]The original plaintiffs in this action consisted of all the group two employees. Many of the original plaintiffs have chosen not to pursue this appeal. The appellants use the term "plaintiffs" to refer to the 19 original employees.

be employed by Reltron at their previous salaries and would not receive severance pay. They were told that if they did not go to work for Relton, their separation would be considered a voluntary termination and they would not receive severance pay or unemployment compensation. They were not offered alternative positions with AMF.

After the meeting with AMF officers, all but three of the plaintiffs collectively decided to accept Reltron's employment offer but to pursue legal remedies against AMF and Voit. Reltron guaranteed at least five months' employment and similar benefits, with the notable exception, however, that Reltron did not provide a severance pay benefit. Most of the plaintiffs' job duties remained the same after the acquisition and most received significant raises

during their employment with Reltron. Eventually, Reltron ceased operations in California and paid all involuntarily terminated employees severance benefits equal to one week's wages for every year of service with both Voit and Reltron. Some of the plaintiffs voluntarily resigned from Reltron before its closure and received no severance benefits.

AMF's corporate policy regarding severance benefits, which the trial court found applicable to Voit, was embodied in Corporate Policy 3-17 issued in 1975. That policy states, "Any salaried employee is eligible for a termination allowance if he is separated at company convenience through reduction of work load, reorganization or relocation of facilities . . . . The termination allowance . . . shall provide one-half month's pay for each two and one-half years of completed

service, with a minimum of one-half month and a maximum of six months' pay (30 years of service)." The trial court found that although the acquisition of Voit by Reltron constituted a "reorganization" under 3-17, there was no "separation" because the employees still had substantially similar jobs. The trial court also found that the General Statement delivered to the Voit employees the day before the sale closed "clarifies and restates" the "probable meaning of 3-17," which was that an employee out of a job would receive severance pay and one not out of a job would not.

I

Appellants first ask us to reexamine our previous decision that ERISA preempts their state law claims, contending the subsequent decision by the United States Supreme Court in Massachusetts v. Morash

(1989) 490 U.S. 107 has limited the scope of ERISA's preemption.

Under the doctrine of "law of the case," a rule of law or principle stated in an appellate court decision is binding throughout all further proceedings in that case, both in the lower court and on a subsequent appeal. (Clemente v. State of California (1985) 40 Cal.3d 202, 211.) The doctrine is not jurisdictional, however, in that it does not affect a court's power to proceed; rather, it is a rule of procedure that exists for reasons of policy and convenience. "It will not be adhered to where its application will result in an unjust decision." (Id. at p. 212.) The primary reason for departing from the doctrine is an intervening change in the law (ibid.), which exception appellants claim here.

In our previous unpublished opinion

(Wright v. AMF Corporation (Sept. 8, 1988)G004589), we relied on the United States Supreme Court's broad language in Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41 to hold "[a]ll state laws pertaining to employee benefit plans, except those regulating insurance, are preempted by ERISA." (Wright v. AMF Corporation, supra, (typed opn. at p.3).) Plaintiffs' complaint alleged AMF's failure to pay them severance benefits when the company was sold was a violation of its pension benefits plans. "Plaintiffs' civil remedy, if any exists, must be obtained through the exclusive ERISA scheme. Damages under state law are simply not available." (Id. at p. 5.)

Appellants now argue that AMF's Corporate Policy 3-17 was not an employee benefit plan under ERISA, citing deposition testimony to that effect from

AMF's Director of Human Resources at the time Voit was sold[2] and the United State Supreme Court case of Massachusetts v. Morash, supra, 490 U.S. 107. In Morash, an employer failed to compensate two discharged vice presidents for vacation time they accrued but did not use, in violation of a state statute. The Supreme Court held that although ERISA included vacation benefits in its definition of an employee welfare benefit plan, it did not intend to regulate "ordinary" vacation benefits, which are "typically fixed, due at known times, and do not depend on contingencies outside the employee's control . . . ." (Id. at p. 115.) The court referred to Department of

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[2] The deponent, Joe van Dorn, testified he never thought the severance pay policy was an ERISA plan and he assumed severance pay and wages were paid from the same bank account.

Labor regulations, which characterized the payment of vacation benefits out of an employer's general assets rather than a trust fund as "payroll practices" and not employee welfare benefit plans within the meaning of ERISA. (Id. at pp. 117-118.)

Appellants seize upon this language and argue that severance benefits paid from an employer's general assets, rather than a trust fund, are not regulated by ERISA. But the Morash opinion specifically distinguished the types of benefits covered by ERISA, including severance benefits, from the type of vacation benefit under review. "The distinguishing feature of most of these benefits is that they accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee . . . . Thus, for example, plans to pay employees

severance benefits, which are payable only upon termination of employment, are employee welfare benefit plans within the meaning of the Act." (Id. at pp. 115-116.) In the face of this clear language, it seems that Morash does not represent a change in the law so as to allow us to disregard the doctrine of law of the case and reexamine our previous decision on preemption.

II

Appellants next contend that even if their claim for severance benefits is governed by ERISA, they are entitled to recover. A participant or beneficiary of a welfare benefit plan is entitled to bring a civil action in state or federal court to recover benefits due him under the terms of his plan. (29 U.S.C. §1132, subd.(a)(1)(B) & (e).) A claim for benefits wrongfully denied is determined

by the trial court's de novo review of the plan provisions, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." (Firestone Tire & Rubber Company v. Bruch (1989) 789 U.S. 101, 114.)

Appellants claim the trial court failed to use the de novo standard of review when interpreting Policy Memorandum 3-17 or the General Statement. But the record indicates otherwise. Although the trial court received evidence of AMF's interpretation of its policy, permissible to clarify ambiguous terms of a plan (Awbrey v. Pennzoil Co. (10th Cir. 1992) 961 F.2d 928, 930-31), it gave no deference to AMF's interpretation when

making its findings.[3]

Appellants challenge the sufficiency of the evidence to support the trial court's findings even if made under a de novo standard. Of course, our task is to uphold the judgment below if supported by any credible evidence, notwithstanding the existence of evidence to the contrary. (Bowers v. Bernards (1984) 150 Cal. App. 3d 870, 873-874.)

The trial court found Policy 3-17 did not provide for severance benefits to appellants because they were not separated from their employment. Van Dorn testified appellants did not miss one day of work following the asset sale to Reltron. They

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[3] Pre-Firestone, many trial courts upheld the administrator's or fiduciary's decision unless it was clearly unreasonable. (Firestone Tire and Rubber Corp. v. Bruch, supra, 489 U.S. at p. 114.)

retained their same jobs at the same location with the same initial salary and with similar benefits.[4]

The trial court also found the purpose of Policy 3-17 was to provide assistance to employees out of a job. In support of that finding, Van Dorn stated the purpose of the policy was to provide "an amount of income or cushion for the employee once they leave the company and set out to find their next opportunity." The trial court's conclusion comports with the weight of authority. The usual purpose of a severance benefits plan "is, first and foremost, to provide employees with a buffer against the privations which

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[4]Minor differences in employee benefits are irrelevant to a determination of entitlement to severance pay when an employee is retained by a purchasing company. (Sejman v. Warner-Lambert Co., Inc. (4th Cir. 1989) 889 F.2d 1436.)

so often attend unforseen layoffs." (Allen v. Adage, Inc. (1st Cir. 1992) 967 F.2d 695, 702. See also Awbrey v. Pennzoil Co., supra, 961 F.2d at pop. 931-932.)

Van Dorn also testified that when AMF sold the assets of other subsidiaries in the past, which it had done a number of times, none of the retained employees received severance benefits. "Although past practice may not have as much probative value after Bruch as theretofore . . . ., it is still frequently used by courts as a device for deciphering the meaning of ambiguous plan provisions." (Allen v. Adage, Inc., supra, 967 F.2d at p. 702.) This evidence also supports the trial court's conclusion regarding the meaning of the word "separated."

III

AMF requests sanctions in the form of

its attorney's fees for this appeal of $31,939.53. It complains that the appeal on the preemption issue is "totally and completely without merit." (Marriage of Flaherty (1982) 31 Cal. 3d 637, 650.) But we do not agree. Although we have concluded the judgment must be affirmed, the appellants' contentions are not frivolous.

AMF also asserts appellants should be sanctioned because they have violated court rules by quoting from exhibits not introduced at trial and by citing facts never admitted into evidence. California Rules of Court, rule 13 requires the statement of facts in the opening brief to be "accurate and confined to matters in the record on appeal." And appellants have taken liberties with the record, as AMF claims. But the facts outside the record included in the brief are not

particularly significant to the issues raised, and their inclusion could not have been the cause of any substantial portion of AMF's attorney's fees on appeal.

Likewise, they did not mislead or delay this court in the preparation of this opinion. In Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, the opening brief contained no references to the record, "confused and obfuscated the factual and legal bases" of the case, and required the reviewing court to expend substantial additional time to prepare an opinion. Furthermore, counsel refused to desist in citing an unpublished opinion, even after being warned. In light of these transgressions, the court assessed sanctions payable to the clerk of the court. (Id. at pp. 875, fn. 1, 886.) Short of such egregious violations of the court rules, it is appropriate simply to

disregard the extraneous facts when reviewing the case. (Kendal v. Allied Investigations, Inc. (1988) 197 Cal. App. 3d 619, 625.)

The judgment is affirmed. The request for sanctions is denied, but AMF is entitled to its costs on appeal.

WALLIN, J.

We concur:

Moore, Acting P.J.

Crosby, J.

APPENDIX B:

29 U.S.C., Section 1002(1);
29 U.S.C., Section 1002(3);
29 U.S.C., Section 1144(a)

29 U.S.C., Section 1002(1)

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or beneifts in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or

prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and isurance to provide such pensions).

29 U.S.C. 1002(3)

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. 1144(a)

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title

and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

APPENDIX C:

LABOR CODE SECTION 201

Time for payment on discharge or layoff; seasonal employment; mail

If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. An employer who lays off a group of employees by reason of the termination of seasonal employment in the curing, canning or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment whtn the wages of said employees are paid within such reasonable time as may be necessary for computation and payment thereof; provided, however, that such reasonable time shall not exceed 72 hours, and further provided that payment shall be made by mail to any such employee who so requests and designates a mailing

address therefor.

Chapin v. Fairchild Camera and Instrument Corp.

Chapin v. Fairchild Camera etc. Corp. [31 Cal. App. 3d 192]

[Civ. No. 29866.

Court of Appeals of California, First Appellate District, Division Two.

March 20, 1973.]

MARY ANN CHAPIN et al., Plaintiffs and Appellants, v. FAIRCHILD CAMERA AND INSTRUMENT CORPORATION, Defendant and Respondent

SUMMARY

The trial court determined that employees of a department of a corporation sold to another corporation were not entitled to termination pay from the seller. Standard practice instructions of the seller provided for "in lieu of notice pay" for hourly employees and severance

pay for salaried employees in the event of a layoff. The employees had been given the option of continuing their employment with the buyer in identical jobs with similar but not identical fringe benefits. All employees but one accepted, but within three months after the sale date about half of them were terminated by the buyer. The termination benefits provided by the buyer were not equal to those previously available from the seller and the sale contract did not provide for the buyer's assumption of the termination pay obligation of the seller. (Superior Court of Santa Clara County, No. 215017, Marshall S. Hall, Judge.)

The Court of Appeal reversed, holding that the sale amounted to a layoff within the meaning of the seller's standard practice instructions which were a part of

the understanding of employment. The court noted that the sale made it wholly impossible for the employees to continue their employment with the seller, and it pointed out that separation pay is not a form of unemployment compensation so as to make unemployment a prerequisite to the right thereto.

(Opinion by Taylor, P. J., with Kane and Rouse, JJ., concurring.)

HEADNOTES

Master and Servant § 26.5—Contract of Employment—Severance Pay and Similar Benefits.

1. Termination pay provisions are identically <*pg.193> construed whether they are contained in formal written agreements, such as collective bargaining agreements, or in a corporate personnel policy that becomes a part of the

understood employment agreement, or are provided by statute.

Master and Servant § 26.5—Contracts of Employment—Severance Pay and Similar Benefits.

2a, 2b. A corporation's sale of an entire department to another corporation constituted a "layoff" of the employees in that department so as to entitle hourly employees to "in lieu of notice pay" and salaried employees to severance pay as provided in the seller's standard practice instructions, even though the employees were given the option of continuing with the buyer in identical jobs with similar but not identical fringe benefits, and all but one accepted, where the sale made it wholly impossible for the employees to continue their employment with the seller, and where termination benefits provided by

the buyer were not equal to those previously available from the seller, and the sale agreement did not provide for assumption by the buyer of the seller's obligation of termination pay to the employees.

[Construction and effect of severance or dismissal pay provisions of employment contract or collective bargaining agreement, note, 40 A.L.R.2d 1044. See also Cal.Jur.2d, Master and Servant, § 42; Am.Jur.2d, Master and Servant, § 81.]

Master and Servant § 26.5—Contracts of Employment—Severance Pay and Similar Benefits.

3. Separation pay is not analogous to, nor is it a form of, unemployment compensation, and unemployment is not a prerequisite to the right to separation pay, which is a kind of accumulated compensation for past services and a

material recognition of their past value. It concerns the past, not the future, and once it is earned, it becomes payable no matter what may thereafter happen.

COUNSEL

Schiller & Rose, Philip L. Grauman and M. Fred Rose for Plaintiffs and Appellants.

Danaher, Gunn & Klynn and Michael Klynn for Defendant and Respondent. <*pg.194>

OPINION

TAYLOR, P. J.

This appeal by certain former salaried and hourly employees (Employees) of the Memory Products Department (Memory Products) of respondent, Fairchild Camera and Instrument Corporation (Fairchild), from an adverse judgment after a court trial, presents a question of first impression in this state as to the nature

of severance and in lieu of notice benefits<fn 1> in a contract of employment. For the reasons set forth below, we have concluded that the trial court erred in concluding that Fairchild's sale of Memory Products was not a termination of employment that would entitle the Employees to the benefits in issue.

The record reveals the following pertinent facts: Fairchild, the parent foreign corporation with several subsidiaries and 13 different divisions in 50 states, created Memory Products in November 1965, as a separate department to produce memory cores for small computers. Fairchild's Semiconductor Division (Semiconductor), under contract, performed personnel and payroll functions, as Semiconductor did for all Fairchild west coast personnel. The Employees were thus

subject to the corporate standard practice instructions (SPIs) issued by Fairchild's home office and the divisional instructions locally issued by Semiconductor. The SPIs and divisional instructions were kept in loose leaf binders and available to all personnel who wanted to look at them; these binders were about two inches thick and contained several hundred pages.

Prior to May 1965, a time when about six of the employees were employed by Semiconductor, Fairchild's SPI 706 (which applied only to salaried Employees), provided, so far as pertinent, that salaried personnel were entitled to "separation allowances" of one week's pay for up to one year's service, and two weeks' pay for over one year to 10 years of service.<fn 2> 706 also provided that severance pay was "intended to cover the

readjustment period required by the employee to obtain another position."

Semiconductor's divisional instructions 710 and 713, respectively, so far as pertinent, defined "layoffs" as the involuntary termination of employment <*pg.195> due to lack of work, and provided that on layoff: 1) hourly Employees were entitled to one week's notice or one week's pay in lieu thereof ("in lieu of notice pay"); and 2) salaried Employees were entitled to one week's severance pay, for service up to one year, and two weeks' severance pay for service of more than one year. While neither 706 nor 710 and 713 were concealed from the Employees, those who testified had no knowledge of 706, but had knowledge of 710 and 713.

In January 1968, Fairchild began negotiations with Core Memories, Inc.

(Core) for the sale of Memory Products. At meetings held during the second week of February, the Employees were informed by a Fairchild executive, Dr. Noyce, that a sale was pending but were not told of the exact date. The Employees were also informed that Core wanted to purchase Memory Products as a continuing business and wanted to retain all personnel, in identical jobs with continuing seniority rights and similar but not identical fringe benefits.<fn 3> The contract of sale was signed on Friday, March 1, 1968, at which time Core agreed to continue the same rate of pay and seniority rights of Memory Products' Employees and similar fringe benefits; the agreement did not contain any sum for severance pay. The contract was executed on Saturday, March 2, 1968, and on Monday, March 4, 1968, Core took over the operation of Memory

Products. All but one of the employees transferred to Core; in April of 1968, Core terminated 40 of the 187-191 Employees; within three months of the sale date, Core terminated another 50-55. Core paid severance or in lieu of notice pay to some of the discharged Employees. These payments, however, were not equal to the amounts that would have been payable to them pursuant to divisional instruction 713, and, in some instances, were made purely at the discretion of Core's management.

Employee, Mary Ann Chapin, filed a complaint with the labor commissioner and subsequently in the small claims court for severance benefits under her contract of employment with Fairchild. By stipulation, Fairchild's appeal from the municipal court action was dropped on filing of the instant class action in the

superior court.

The trial court found that this was a valid class action pursuant to Code of Civil Procedure section 382, but that the Employees were not entitled to damages or benefits. The trial court based its conclusion on the following premises: Employees had the option at the time of sale of obtaining <*pg.196> severance pay from Fairchild if they did not wish to become employed by Core. When the sale was consummated, Employees were in fact offered jobs by Core that resulted in their receiving full seniority rights and substantially equal fringe benefits from Core. The acceptance of employment with Core by Employees was done with full knowledge and intention, freely and willingly, and constituted an acceptance of Core's employment terms, a waiver of any rights pursuant to their employment

agreement with Fairchild and further constituted a novation and substitution of Core's terms of employment for Fairchild. The transfer of employment from Fairchild to Core did not constitute a layoff within divisional instruction 713. At least two weeks prior to the sale of Memory Products, the Employees were told at a meeting by a vice president of Fairchild and a representative of Core about the intended sale and the opportunity to become employed by Core. This meeting constituted notice within divisional instruction 713 and gave the Employees a reasonable choice concerning their future employment.

At the outset, we note that the trial court's conclusion was based on a legal theory of novation that was neither pleaded, proved nor urged by either party,<fn 4> and reversal would be

required on this ground alone. Novation must be specifically pleaded (Alexander v. Angel, 37 Cal.2d 856 [236 P.2d 561]). In addition, the findings that the February meetings constituted proper notice to the hourly Employees<fn 5> and that SPI 706 became a part of the Employees' contract of employment<fn 6> are not supported by the record. <*pg.197>

While the interpretation of severance and in lieu of notice benefits<fn 7> in a contract of employment has not previously been presented to an appellate tribunal of this state, there are numerous decisions in other jurisdictions (see 147 A.L.R. 151; 40 A.L.R.2d 1044). [1] As Fairchild relies on the absence of a statutory requirement and/or a collective bargaining agreement, we are constrained to point out, preliminarily, that termination pay provisions are identically

construed whether contained in formal written agreements, such as collective bargaining agreements (Adams v. Jersey Central Power & Light Company (1956) 21 N.J. 8 [120 A.2d 737]), or a corporate personnel policy that becomes a part of the understood employment agreement (Willets v. Emhart Manufacturing Company, supra; Mace v. Conde Nast Publications, Inc. (1967) 155 Conn. 680 [237 A.2d 360]), or pursuant to a statute (Bolta Products Div. v. Director of Div. of Emp. Sec. (1970) 356 Mass. 684 [255 N.E.2d 357]).

[2a] The record here establishes: 1) the existence of an understanding of employment between the Employees and Fairchild prior to the sale of Memory Products; 2)pursuant to Fairchild's employment policies, salaried personnel were entitled to one or two weeks of severance pay, depending on length of

service, and hourly personnel to one week's notice, or one week's pay in lieu thereof, as set forth in Semiconductor's divisional instruction 713; 3) the interpretation of separation allowances as unemployment compensation in original SPI 706 and the subsequent exclusion of separation allowances on the sale of a facility in revised SPI 706 were never communicated to any of the Employees; 4) the termination benefits provided by Core to the Employees were not equal to those previously available from Fairchild; and 5) Fairchild's agreement with Core for the sale of Memory Products as a going concern, including all personnel, did not contain a sum for the separation benefits here in issue.

Here, as in Willets v. Emhart Manufacturing Company, supra, the underlying question is whether the sale of

Memory Products was a layoff for lack of work within the language of 713. There can be no question that here, as in Willets, the sale involved a permanent release of the Employees <*pg.198> by Fairchild. By that sale, Fairchild made certain that it could no longer fulfill its part of the employment relationship (Matthews v. Minnesota Tribune Co. (1943) 215 Minn. 369 [10 N.W.2d 230, 147 A.L.R. 147]). Nor can it be argued that this release is not a layoff because it is permanent and not temporary in duration. Divisional instruction 713 defines a layoff as involuntary termination due to lack of work, consistent with the dictionary and accepted definition of a layoff as a cessation of employment because of a slack in production and without prejudice.<fn 8> The fact that a layoff is often temporary does not require

that it must be (see International Ass'n of Machinists v. State (1943) 153 Fla. 672 [15 So.2d 485]).

Certainly, Fairchild's sale of Memory Products was a permanent layoff of the Employees. Fairchild's admitted modification of 706 after the 1965 decision in Willets v. Emhart, supra, (discussed in fn. 2 above), indicates that its own interpretation of its own personnel policies prior to the 1965 amendment and those of its Semiconductor division, as set forth in 710 and 713, was that separation benefits would be payable on the sale of a facility or division.

The trial court and Fairchild make much of the fact that the Employees suffered little, if any, immediate economic loss, as they remained in continuous employment with their seniority rights and at the same rate of pay with

Memory Products. An identical argument was rejected in Willets, supra, at page 548: "The defendant makes much of the fact that the plaintiffs have suffered little, if any, immediate economic loss. It argues that the principal difference is not in the work or pay of the plaintiffs but in the ownership of the employer's business. This argument involves the proposition that events occurring subsequent to the layoff are the important factors in the determination whether the plaintiffs are entitled to separation pay. This is not true. [3] As was pointed out in Adams v. Jersey Central Power & Light Company, 36 N.J.Super. 53, 71, 114 A.2d 776, aff'd, 21 N.J. 8, 120 A.2d 737, unemployment is not a prerequisite to the right to separation pay which may, and frequently does, exist where there is no interruption whatever in the continuity of

employment. Separation pay is not analogous to, nor is it a form of, unemployment compensation. Rather, it is a kind of accumulated compensation for past services and a material recognition of their past value. [Citation.] It concerns the past, not the future, and once it is earned, it becomes payable no matter what may thereafter <*pg.199> happen. For various applications of this rule, see the cases set forth in the annotations in 147 A.L.R. 151 and 40 A.L.R.2d 1044."

Fairchild attempts to distinguish Willets on the ground that in that case the court was concerned with equitably compensating personnel who had to move from Connecticut to Louisiana, to continue their employment with the purchaser. The theory of Willets, quoted above, indicates that this is not a proper basis of

distinction. Willets was followed in Mace v. Conde Nast Publications, Inc., supra, and Straus-Duparquet, Inc., supra.

[2b] Here, as in Adams v. Jersey Central Power & Light Company, supra, 120 A.2d 737, 741, the fact remains that the employment with the seller was terminated; the Employees were hired by Core under substantially different terms<fn 9> that not only did not provide severance pay of the same duration as Fairchild, but also did not undertake to discharge Fairchild's obligation of severance pay to the Employees. Thus, it cannot be said that the termination of their employment by Fairchild was voluntary on the part of the Employees. We are not concerned with the new jobs but the old ones. The termination was entirely involuntary on the part of the Employees. Fairchild sold Memory Products, that part of its business

in which the Employees were engaged, and by its voluntary act made it wholly impossible for the Employees to continue their employment with Fairchild.

As indicated above, the trial court determined the issues on the basis of novation. Even assuming the issue had been properly pleaded, it would not be possible here as there was no consideration (Ybarra v. Solarz, 56 Cal.App.2d 342, 346 [132 P.2d 880]).<fn 10> Nor could there be a novation without the consent of the Employees. Thus, Fairchild's reliance on Armstrong v. Cherry, 89 Cal.App. 442 [264 P. 798]. is inapposite.<fn 11> We note that an <*pg.200> employer's identical contention based on novation was carefully analyzed and rejected by the court in Mace v. Conde Nast Publications, Inc., supra, at page 363, as follows: "The plaintiffs knew

nothing of the agreement between the defendant and Butterick until after it was signed. The plaintiffs went to work for Butterick because they were automatically transferred there by the defendant without being requested to transfer there and without either an oral or a written agreement by them to such a transfer.

"There can be no question that, as a result of the licensing agreement with Butterick, the defendant permanently terminated its employer-employee relationship with the plaintiffs and, at the same time, effected a reduction in its staff. That termination, without more, served to entitle the plaintiffs to severance pay under the terms of their employment contract. [Citation.] The defendant sought to escape this result by providing that the circumstances established a novation by indicating that

the plaintiffs had, by their actions, expressed acceptance of Butterick in lieu of the defendant as the company to which they would look for severance payments. 'Novation' is a term usually used to refer to instances in which a new party is introduced into a new contract. [Citation.] It requires proof that the one in the position of creditor, in this case the plaintiffs, had accepted a new debtor, in this case Butterick, in the place of the defendant to which they would look for fulfilment of the severance pay obligation owing to them. [Citation.] In addition, it requires proof that the plaintiffs had agreed to a discharge of the defendant's obligation to them. [Citation.]"

Fairchild's public policy argument concerning the initiation of business sales and mergers is likewise without

merit. The many cases in other jurisdictions, discussed above, do not suggest that the sale of businesses has been inhibited by the holdings of the cases cited. We may take judicial notice of the many corporate sales, mergers and reorganizations that have taken place in recent years and venture to suggest that these are not related to severance pay provisions. Fairchild is not prohibited from further sales, only from sales that do not take into account its pre-existing contract obligations to Employees that are sold as part of the on-going business. Fairchild can <*pg.201> easily protect itself by informing its personnel that certain benefits do not accrue or are not payable in cases of sale or merger.

The judgment is reversed and the case remanded to the trial court for an assessment of the precise damages

sustained by each of the Employees.

Kane, J., and Rouse, J., concurred.

HISTORY

A petition for a rehearing was denied April 19, 1973, and respondent's petition for a hearing by the Supreme Court was denied May 16, 1973. <*pg.202-207>

FOOTNOTE 1 Under the terms of the employment here in issue, the salaried Employees were entitled to "severance pay" benefits, and the hourly Emplyees to "in lieu of notice pay" benefits. Thus, the terms are interchangeable (cf. Straus-Duparquet, Inc. v. Local U. No. 3 Int. Bro. of Elec. Wkrs. (2d Cir. 1967) 386 F.2d 649).

FOOTNOTE 2 On May 19, 1965, after Willets v. Emhart Manufacturing Company (1965) 152 Conn. 487 [208 A.2d 546], 706 was amended to provide that employees terminated by the sale of a Fairchild

facility would not be eligible for a separation allowance. However, the court below found that the employees who so testified did not have notice of this amendment and could make no findings as to the others; and did not base its decision on the provisions of 706.

FOOTNOTE 3 For example, for salaried Employees with service of more than one year, Core provided one week of severance pay, in contrast to Fairchild's two weeks of severance pay. The vacation and insurance benefits also differed.

FOOTNOTE 4 The record indicates that novation was first mentioned negatively by the Employees' counsel in his closing argument to the trial court. Fairchild's counsel stated that the "suggestion that this is a situation of novation is absurd. It is not a novation situation." Although the trial court indicated that it would

permit an amendment of the pleadings, no motion to amend was ever made.

FOOTNOTE 5 The uncontroverted evidence indicates that the Employees were told that the sale was imminent, but were not given a specific date. On the afternoon of Friday, March 1, the badges of the Employees were first collected and then returned as the sale was in doubt. None of the Employees received written notice of the termination of their employment with Fairchild, and apparently were not aware that Core had, in fact, taken over, until Monday, March 4.

FOOTNOTE 6 The Employees were informed of the substance of 710 and 713; there was conflicting evidence as to whether 713 had been posted. The uncontroverted evidence indicates that neither 706 (either in its revised or original form), nor its content, was ever

communicated to the Employees. Fairchild's policy was that SPIs were distributed in binders to executives and available for inspection by other personnel. Ms. Chapin, as executive secretary to the general manager of Memory Products, was in charge of keeping the binders up to date and answering questions of Memory Products personnel about their contents but had never seen or heard of 706. At the hearing before the labor commissioner and in the small claims court, Fairchild's witnesses indicated that 706 had never been circulated as it was only an interoffice memo.

FOOTNOTE 7 Fairchild argues that public policy supports its position and cites the following from Commerce Clearing House Wage and Hour Reporter, PL 25.580.55: "severance pay is not pay for time worked; just the reverse is true – it

depends upon the employee not working at the time he receives it." The language is quoted out of context from an illustration indicating that under the Fair Labor Standards Act, an employer is not allowed to credit severance pay against regular or overtime wages due to an employee, so that on termination, an employee is entitled to both. This is also the law in this state (Powell v. California Dept. of Employment, 63 Cal.2d 103 [45 Cal.Rptr. 136, 403 P.2d 392]), but does not support Fairchild's argument or resolve the issues here presented.

FOOTNOTE 8 Webster's New Collegiate Dictionary (2d ed.) page 477, states: "Layoff. The act of laying off, esp. work or workmen; a period of being laid off work; a shutdown."

FOOTNOTE 9 Apart from the differences in fringe benefits previously mentioned,

Fairchild had a reputation in the industry that included the fact that there had never been a layoff.

FOOTNOTE 10 Chinn v. China Nat. Aviation Corp., 138 Cal.App.2d 98 [291 P.2d 91], is also pertinent as there the employee (who had previously announced his intention to resign), remained on the job after the employer enacted regulations providing for severance pay. In holding that the employee had stated a cause of action for severance benefits, this court (division one), quoting from Vogel v. Bankers Bldg. Corp., 112 Cal.App.2d 160, 169 [245 P.2d 1069], said at page 103: "'A single consideration may support the several counterpromises made by the other party to the transaction.' Thirdly, it should be remembered that plaintiff did not terminate the employment. It was terminated by the employer, so that the

question of what the employee's rights might have been had he left the employment a moment after the regulations were announced is academic. While, of course, there was nothing in the regulations that guaranteed the employee continued employment, and therefore the employer could terminate the employment at any time, the regulations stated the obligation of the employer upon such termination."

FOOTNOTE 11 In fact, in Armstrong v. Cherry, supra, although the employee was denied damages because he knew of and acquiesced in the new conditions of employment, this court (division one) said at page 444: "It is a rule universally recognized, that while a master may not close out his business without becoming liable in damages to an employee under a contract of employment for a specific

term, still an immaterial change gives no cause of action for damages where there is otherwise no change in the manner of conducting the business and the employer continues in a way to be the real owner. (39 Cor.Jur. 76.) See, also, Levy v. Friedlander, 24 La.Ann. 439."